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Prudential Ins Co v. Massaro

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2977

PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

JOHN J. MASSARO,

Defendant/Third-Party Plaintiff

v.

JOHN DOES I-X

Third-Party Defendant

John J. Massaro,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

(District Court No. 97-CV-2022)
District Court Judge: Alfred M. Wolin

Submitted Under Third Circuit LAR 34.1(a)
June 25, 2002

Before: ALITO, AMBRO, and GARTH, Circuit Judges.

(Opinion Filed: July 18, 2002)

OPINION OF THE COURT

PER CURIAM:

Prudential Insurance Company of America ("Prudential") brought this action to permanently enjoin its former in-house attorney in its Florida legal department, John Massaro, from disclosing any additional confidential or privileged information about the company. Prudential alleges that Massaro, who has already made multiple disclosures of this nature directly to Prudential's legal adversaries, has unjustifiably breached his duty as Prudential's attorney and fiduciary. The District Court agreed. It granted summary

judgment to Prudential and ordered a permanent injunction to silence Massaro. We affirm.

The long factual narrative of this case is well known to the parties. The central issue on appeal is whether Massaro's disclosures can be justified under the crime-fraud exception to the attorney-client privilege and the duty of confidentiality. We hold that Massaro's disclosures were not justified by the crime-fraud exception.

Generally, attorneys have a duty not to disclose the confidences of their clients. The attorney-client privilege protects confidential communications made between attorney and client for the purpose of obtaining or providing legal assistance. See Restatement of the Law (Third) Governing Lawyers 68 et seq. ("Restatement"). In addition, an attorney's broader duty of confidentiality covers "information relating to the representation of a client," regardless of the source of that information or its disclosure by others. Restatement 59. Disclosure of this confidential information is forbidden where "there is a reasonable prospect that doing so will adversely affect a material interest of the client" Id. 60. The law in Florida and in New Jersey are substantially consistent with each other and the Restatement. See Fla. State Bar Rule 4-1.6; N.J. Rule of Prof. Conduct 1.6.

The crime-fraud exception to both the duty of confidentiality and the attorney-client privilege allows an attorney to disclose confidential information in certain circumstances. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992). In Florida, an affirmative duty to disclose privileged or confidential information arises only when necessary to prevent a crime or bodily harm. See *The Florida Bar v. Lange*, 711 So. 2d 518, 519-20 (Fla. 1998). In this Circuit, use of privileged material under the crime/fraud exception requires a three-step judicial process: (1) presentation of the factual basis for a good faith belief that the exception would apply, (2) in camera evaluation of the material by the court, and (3) affording the party opposed to disclosure "an absolute right to be heard by testimony and argument." See *Haines*, 975 F.2d at 96-97.

Applying the ethical rules and precedents of New Jersey, Florida, and this Circuit, the District Court thoroughly explained why, as a matter of law, Massaro could not prevail. It stated unequivocally that

Massaro obviously complied with none of these procedural niceties designed to protect his client, Prudential, from an improvident assertion of the crime-fraud [exception to the] privilege. Massaro had no right unilaterally to invoke the crime-fraud exception; his statement to Prudential that his ethical duty compelled disclosure was completely contrary to law. . . .

Absent a judicial finding [authorizing disclosure, Massaro's] confiding in attorneys adverse to Prudential, giving sworn statements to authorities investigating the company, [and] filing an affidavit in open court all were in flagrant violation of Massaro's duty as an attorney.

Appendix at 28.

We agree that Massaro cannot justify his disclosures as within the crime-fraud exception or upon any other basis. Though perhaps in good faith, his actions inexcusably contravened his ethical duties as an attorney. The grant of summary judgment to Prudential and the permanent injunction against Massaro are affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

Circuit Judge